Nos. 08-1498 & 09-89

In the

Supreme Court of the United States

ERIC HOLDER, ATTORNEY GENERAL, ET AL.,

Petitioners/Cross-Respondents,

v.

HUMANITARIAN LAW PROJECT, ET AL.,

Respondents/Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND CENTER FOR LAW AND COUNTERTERRORISM IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that one of the foremost duties of the federal government is to protect the nation's security in time of war. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance to this case, Institute scholars have written extensively on national security matters and the constitutional intersection of national security and civil liberties including amicus curiae briefs in the cases of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644 (6th Cir. 2007).

The Center for Law & Counterterrorism is a joint project of the Foundation for Defense of Democracy and the National Review Institute, focusing on counterterrorism and American national security. Co-Chairman Andrew C. McCarthy was a federal prose-

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[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been filed previously. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

cutor for 18 years at the U.S. Attorney's Office for the Southern District of New York and worked on several terrorism/national security investigations.

SUMMARY OF THE ARGUMENT

On September 11, 2001, Al Qaeda terrorists killed 2,796 civilians, obliterated the twin World Trade Center towers, attacked the Pentagon, and attempted to destroy either the U.S. Capitol or White House. President Bush declared that the attacks triggered a state of war with Al Qaeda, and Congress followed with an Authorization to use all "necessary and appropriate force" against those whom the President determined "planned, authorized, committed or aided" the September 11th attacks, or who harbored said persons, "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[2]

America remains at war today. The terrorist enemy remains unvanquished, though thankfully more than twenty-three attempted attacks by it inside the United States since 9/11 have been thwarted.[3] Congress enacted sections 302 and 303 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and amended them in 2004, the Intelligence Reform and Terrorism Prevention Act ("IRTPA"), 18 U.S.C.

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[2] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)

[3] *Home-Grown Bombers,* THE ECONOMIST (October 1, 2009), *at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=14561049.

§ 2339B(a) and 8 U.S.C. § 1189(a)(1), to prohibit any kind of support for named Foreign Terrorist Organizations ("FTOs"), even when individuals or groups contribute to ostensibly non-violent functions.

By finding the material support statute impermissibly vague, the court below invalidated an Act of Congress, undermined the government's power to conduct war, and significantly restricted congressional power to prohibit aid to the enemy.

ARGUMENT

I. THE FRAMERS RECOGNIZED THAT THE NATIONAL GOVERNMENT'S PRIMARY DUTY IS THE PROTECTION OF THE NATION'S SECURITY

The decision below erred in ignoring this case's unique circumstances: the Nation is at war. A terrorist enemy has successfully attacked the homeland once and continues efforts to launch attacks on Americans, most recently via a fortuitously unsuccessful airline bombing attempt on Christmas Day.[4] The federal government's constitutional duty to protect the Nation and its citizens during time of war is at stake.

Strengthening the United States' ability to protect the nation's security was one of the primary mo-

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[4] *See* Anahad O'Connor and Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, NEW YORK TIMES (Dec. 25, 2009), *available at* http://www.nytimes.com/2009/12/26/us/26plane.html?scp=8&sq=Detroit%20plane%20attack&st=cse.

tivations behind the drafting the Constitution. Anti-Federalists warned of diminished state autonomy if more powers were granted to a national government, but the Federalists won ratification of the Constitution in part because of the widely-recognized need to defend against external threats.[5] In this they heeded John Locke's claim that the "*preservation of society . . .* [and] every person in it" was the "*first and fundamental natural law.*" For only after ordered security was established—"as it consisted with the public good"—could concerns about personal liberty, protection of property, rule of law, and self-government be considered. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 355-56 (Peter Laslett ed., 1988) (emphasis in original).

In the debate over ratification of the Constitution, Alexander Hamilton noted that one of "the principal purposes" of the newly created federal government was "the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks." THE FEDERALIST NO. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Accordingly, as Hamilton rightly recognized,

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[5] Edmund Randolph criticized the Confederation, for example, because it "produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority . . . they could not cause infractions of treaties or of the law of nations, to be punished . . . ." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 29, (Tuesday, May 29) (W.W. Norton & Co. ed. 1987). *See also*, FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3 (SR Books 1986) (1973) ("The most elemental duty of the Federation government, . . . was the protection of the country against foreign attack").

the Framers' intent was to endow the federal government "with all the powers requisite to [the] complete execution of" this purpose." *Id.*, at 153-54. The government's powers in the national security context were to be very broad, according to Hamilton:

> These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Id., at 153 (emphasis omitted). This was not a stray thought, but a consistent theme in the Federalist Papers, the leading argument in favor of the ratification of the Constitution. Because "it can[not] be shown that the circumstances which may affect the public safety are reducible within certain determinate limits," Hamilton wrote, "it must be admitted as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy." THE FEDERALIST NO. 23 (Alexander Hamilton), *supra*, at 154. The federal government should possess "an indefinite power of providing for emergencies as they might arise." THE FEDERALIST NO. 34 (Alexander Hamilton), *supra*, at 207.

In the decade that followed, key proponents of ratification reaffirmed the critical importance of the authority to provide for the common defense given by the Constitution to Congress and to the President. John Adams reflected on the critical role for national defense, for example, noting: "Nothing . . . will contribute so much to the preservation of peace, and the attainment of justice, as a manifestation of that energy and unanimity of [the American people] and the exertion of those resources for national defence which a beneficent Providence has kindly placed within their power." JOHN ADAMS, SPEECH TO BOTH HOUSES OF CONGRESS, (November 22, 1797) *reprinted in* 9 THE WORKS OF JOHN ADAMS at 122 (Little Brown & Co. 1854). And in his very first Act as President, George Washington affirmed the "particular regard" which should be given to "common defence," stating in his First Inaugural Address that "to be prepared for war is one of the most effectual means of preserving peace." GEORGE WASHINGTON, SPEECH TO BOTH HOUSES OF CONGRESS (January 8th 1790) *reprinted in* WRITINGS OF GEORGE WASHINGTON at 329 (Lawrence B. Evans, ed. Knickerbocker Press 1908).

This widely-shared view was embraced a generation later by Justice Joseph Story, himself a product of the American Revolution and one of America's most respected jurists. In his highly-regarded *Commentaries on the Constitution*, Justice Story cautioned a crisis of both "liberty and sovereignty" if the government did not have authoritative power to act in defense of the nation:

> Indeed, in regard to times of war, it seems utterly preposterous to impose any limitations

> upon the power; since it is obvious that emergencies may arise, which would require the most various and independent exercises of it. The country would otherwise be in danger of losing both its liberty and its sovereignty, from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.

JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION, 98 (Melville M. Bigelow ed., Little Brown & Co. 5th ed. 1891) (1833) (emphasis added). Another great commentator on the Constitution, Thomas Cooley, was still making the same point a half century later:

> When war exists the government possesses and may exercise all those extreme powers which any sovereignty can wield under the rules of war recognized by the civilized world....

THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 86-87 (Little Brown & Co. 2001) (1880).

The tensions between liberty and safety were well understood by the Framers. Of course, no one would oppose measures that improve security with no cost to civil liberties. But when trade-offs between the two created tensions, leading Framers held the commonsense belief that the protection of the national security brought greater benefits to society. Alexander Hamilton noted in Federalist 26 that the notion "of restraining the legislative authority in the means of providing for the national defense is one of those refinements that owe their origin to a zeal for liberty

more ardent than enlightened." THE FEDERALIST NO. 26 (Alexander Hamilton), *supra* at 168. As members of the Constitutional Convention delivered the final document to the President of Congress, the cover letter acknowledged that "individuals entering into society, must give up a share of liberty to preserve the rest" and to provide for "the interest and safety of all." GEORGE WASHINGTON, LETTER FROM THE CONSTITUTIONAL CONVENTION TO THE PRESIDENT OF THE CONGRESS (September 17, 1787) *reprinted in* 2 DEBATE ON THE CONSTITUTION 937 (Library of America 1993).

One of the most urgent foreign threats in the Framers' minds was Barbary piracy. Then, as now, a renegade group flouted the law of nations and rules of civilized warfare. These outlaws disrupted the course of business and safe passage for France, Spain, England, and America as they captured ships and cargo, and killed or enslaved sailors and passengers. When Thomas Jefferson and John Adams attempted to negotiate a treaty with Tripoli, they confronted the same intransigence expressed today. They asked what justified war upon nations like America who "considered all mankind [who had done us no wrong] as our friends," and Tripolitan Ambassador to London, Sidi Haji Abdul Rahman Adja replied "that it was their right and duty to make war upon nations [who had not acknowledged their authority as written in the Koran], . . and to make slaves of all they could take as prisoners, . . ." THOMAS JEFFERSON AND JOHN ADAMS TO JOHN JAY (March 28, 1786) *reprinted in* THOMAS JEFFERSON TRAVELS: SELECTED WRITINGS 1784-1789, at 104-05 (Anthony Brandt, ed. 2006). So,

free nations, without the will or means to refuse, submitted to paying tribute and ransom.[6]

So great an influence was this threat to safety and commerce on the constitutional deliberations, American historian Thomas Andrew Bailey observed, "in an indirect sense, the brutal Dey of Algiers was a Founding Father of the Constitution." THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 65 (Appleton-Century-Crofts 1955). John Jay, writing to President of Congress Richard Henry Lee, said that the Barbary threat "did not strike him as a great evil" since "the more we are ill-treated abroad the more we shall unite and consolidate at home." Jay expected that the Barbary hostilities would spur American interest in laying "foundation for a respectable Navy." JOHN JAY TO THE PRESIDENT OF CONGRESS (October 13, 1785) *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782-1793, *at* 171 (Henry P. Johnston, ed. 1891).[7]

It is against this background that this case must be understood. It would run counter to our constitutional traditions and pure common sense to read the

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[6] The United States paid thirty times the price of a seventy-four-gun ship in ransom and tribute over a twelve-year period, or $10 million (the cost of each ship was a third of a million dollars). FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 208 (1986) (1973).

[7] When news arrived in 1793 that eleven American ships had fallen prey to the Algerines, Congress ordered the construction of six warships (although construction of three was later suspended). By 1815, the Algerines had incarcerated 450 Americans "and were only halted when a battle-hardened squadron of ten ships led by Commodore Stephen Decatur subdued a defiant Dey under the mouth of the cannon." *Id.*, at 208-09.

Constitution as disabling the federal government from effectively conducting war to protect the nation from attack, when enhancing that power was one of the principal purposes of the Constitution. It would be equally absurd to interpret the Constitution to create a greater burden on the nation's ability to fight that war when the enemy is a non-state actor, such as a terrorist organization, rather than a nation-state.

II. DURING WARTIME THE FEDERAL GOVERNMENT CAN PROHIBIT THE OPERATION OF GROUPS HOSTILE TO THE UNITED STATES OR ITS ALLIES

As this Court recognized in *Hamdi*, the United States is at war against al Qaeda and affiliated terrorists. The Authorization for Use of Military Force ("AUMF") served to activate the President's war power and to provide that combatant detention for the duration of the conflict "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi v. Rumsfeld*, 542 U.S. 507, 517-18 (2004). Our terrorist enemy infiltrates agents across our borders, covertly provides them with money and assistance, and then launches surprise attacks on innocent civilians. American troops are fighting on battlefields abroad, yet the court below has undercut the reasonable efforts of government to deny aid and support to the enemy at home. In fact, the court below has made it easier for terrorists to operate within the United States than abroad, by limiting the government's powers to stop

foreign hostile groups on U.S. territory, but not abroad.

Even were he acting without congressional authority, the President is invested with the constitutional duty to defend the country from attack and the power of Commander-in-Chief,[8] and so has wide discretion to deploy the forces and methods necessary for the common defense. But where, as here, the President acts in concert with Congress, his war-making powers are exceptionally broad. *Youngstown Steel Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585-86 (1952) (Jackson, J., concurring). Since not all "measures for the carrying on of war" are defined by the Constitution, "[t]he decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution." *Steward v. Kahn*, 78 U.S. 493, 506 (1870). *See also*, *Ex parte Quirin*, 317 U.S. 1, 26 (1942) ("The Constitution thus invests the President as Commander in Chief with the power to wage war . . , and to carry into effect all laws passed by Congress for the conduct of war . . . .")

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[8] Justice Story wrote that the power to "resist invasion" and "carry on war" cannot "properly be presumed to exist in any other department of the government [than the executive]." JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 215 (Regnery Gateway, Inc. 1986) (1859); THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* at 465. ("The executive . . . holds the sword of the community. The legislature . . . commands the purse . . . . The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.").

Elected government, not the courts, has been charged with the chief responsibility to protect the citizenry and defend the nation. During the Civil War, for example, in reviewing President Lincoln's suppression of insurrection, this Court deferred to the Commander-in-Chief to meet with force "such armed hostile resistance" and to confront "a civil war of such alarming proportions." *Prize Cases*, 67 U.S. 635, 670 (1863) (emphasis in original). This Court accepted that the "question [was] to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." *Id.*

The seminal holding in *United States v. Curtiss-Wright* articulated the principle that the President enjoys "broad discretion" over war policy. 299 U.S. 304, 329 (1936). The Court recognized that "the powers to declare and wage war, . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality" and similarly that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *Id.*, at 318.

This Court recently re-affirmed *Curtiss-Wright*'s principle of deference in *Boumediene v. Bush*: "In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches." 128 S. Ct. 2229, 2276 (2008). Indeed, *Boumediene* recognized that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious

threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Id.*, at 2276—77. Despite holding that habeas corpus extended to Guantanamo Bay, the Court did not challenge the traditional deference owed to political branches on questions of war. Against this backdrop, the *Boumediene* holding must be read narrowly.[9]

The present situation does not implicate *Boumediene* because the right of habeas corpus is not at issue. It does, however, invoke *Curtiss-Wright*'s deference principle. The overarching issue is the President's authority to designate a group as a Foreign Terrorist Organization, and to implement an Act of Congress prohibiting support for FTO's.

This Court has applied the same principle of deference in foreign affairs, where the stakes are not as grave as direct threats to national security. "Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 242 (1984) (quotes omitted); *see also*, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive deci-

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[9] *See* "*Extraterritorial Reach of Writ of Habeas Corpus*," 122 HARV. L. REV. 395, 400 (2008) ("Although the Court asked broadly "whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection," it answered its own question quite narrowly. Using a functional approach that took into account practical considerations, the Court limited its holding to Guantánamo Bay").

sions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system").

Because courts do not have the benefit of access to the larger mosaic of national security information, they have been reticent to intervene where political powers are charged with providing for national defense. As Justice Jackson put it, such decisions,

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Waterman, 333 U.S., at 111. "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.*

A. Government May Use Its Power Not Only to Prohibit Terrorist Operations But to Prohibit Support for Any Activities of The Terrorist Organizations

Congress's decision to enact the material support statute, and the President's exercise of delegated power in identifying the terrorist organizations, represents a considered wartime judgment by the political branches of the optimal means to confront the unique challenges posed by terrorism—a judgment to which this Court owes the highest deference. Al Qaeda does not control a state, does not have citizens or cities to protect, and does not field regular, uniformed armed forces that obey the laws of war. Rather than a traditional nation-state, it operates as a covert network that disguises itself within the legitimate flows of global commerce. It raises funds from donations, uses them to pay for personnel, supplies, and training, and then transports agents and communicates with them once in their target countries. Money and services are the lifeblood of a terrorist organization, just as important as access to weapons or recruiting personnel.

Congress recognized that the nation's law enforcement and security agents must be able to shut off financial support and its substitutes to terrorist groups. "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any* contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 301(a), 18 U.S.C. § 2339B *note* (1996) (emphasis added). Congress designed 18 U.S.C. 2339B "to provide the Fed-

eral Government the fullest possible basis, consistent with the Constitution," to curtail assistance to designated FTOs. AEDPA, § 301(b).

The notion that non-violent assistance, financial or otherwise, can advance an FTO's "peaceful" activities without also furthering the violent core of the group's mission is a fallacy. Financial contributions or services given to a terrorist group in one area merely frees up resources and energy for allocation to violent activities. Permitting contributions to FTOs, simply because the donor intends that they be used for "peaceful" purposes, directly conflicts with Congress's determination that no quarantine can effectively isolate "good" activities from the evil of terrorism. *See Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1189 (C.D. Cal. 1998); AEPDA § 301(a)(7).

Congress has determined that there is no discernable line between an FTO's violent and non-violent activities. "[E]ven humanitarian aid can be used by a terrorist organization to help it recruit new members." 153 CONG. REC. S15876 (daily ed. Dec. 18, 2007) (statement of Sen. Kyl). As one court has noted:

> We will not indulge in speculation about whether Congress was right to come to the conclusion that it did. We simply note that Congress has the fact-finding resources to properly come to such a conclusion.

United States v. Hossein Kalani Afshari, No. CR 01-00209(C), 2009 U.S. Dist. LEXIS 33887, at *28 (C.D. Cal. Apr. 14, 2009) (citing *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000)).

1. Permitting Support for FTO Activities Labeled "Charity" Creates an Absurd, Unwarranted Exception.

HLP's position leads to the confounding result that the terrorist organization itself can neuter the Secretary's designations simply by renaming one of its factions "charity." *See United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. Turkette*, 452 U.S. 576, 580 (1981). If Congress cannot proscribe assistance to factions of a designated terrorist organization labeled "charity," then Congress cannot proscribe assistance effectively.

Debating the ban on material support in 1995, Congress recognized that terrorist groups operating "under the cloak of humanitarian or charitable exercise" had already established footholds in the United States. H.R. REP. NO. 104-383, at 43 (1995). This foothold allows FTOs, whether "acting through affiliated groups or individuals," to "raise significant funds within the United States . . . ." AEPDA, § 301(a)(6). A recently exposed example of this foothold is the Alavi Foundation. Incorporated in the United States as a charitable organization in 1973, Alavi Foundation's stated mission was to promote understanding of Islamic culture. *See* www.alavifoundation.org/page03.shtml. The foundation's assets were recently seized after federal agents discovered that the foundation was funneling money into Iran's nuclear program. Michael B. Farrell, *Alavi Foundation Complaint Comes at Delicate Time for US, Iran*, CHRISTIAN SCIENCE MONITOR (Nov. 12, 2009), at www.cxmonitor.com/2009/1113/ po2s17-usfp.html.

Another example, the Holy Land Foundation for Relief and Development, was the largest Muslim charity in the United States, collecting $13 million in the year 2000 alone, purportedly to assist needy Palestinians. In truth, it was funneling funds to HAMAS, a designated terrorist organization. U.S. Gen. Accounting Office, Report to Congressional Requesters: U.S. Agencies Should Systematically Assess Terrorists' Use of Alternative Financing Mechanisms, GAO-04-163, 14 (2003) at http://www.nbr.org/publications/analysis/ pdf/ vol14no5.pdf ("GAO Report"); *see Holy Land Foundation for Relief and Development v. Ashcroft,* 333 F.3d 156 (D.C. Cir 2003); *United States v. Abdulqader*, 2009 U.S. Dist. LEXIS 25011 (N.D. Tex. Mar. 26, 2009.)

As illustrated by the above examples, terrorist groups understand that a strong public relations campaign is critical to their success. *See* BRUCE HOFFMAN, INSIDE TERRORISM 3-15 (Columbia University Press 2005). Indeed, the brand "terrorist" has become so negative that the terrorists themselves avoid it with rectitudinous labels that belie their true purpose. *Id.*, at 21. "Al Qaeda," for example, has been translated as "base," "foundation," "precept," or "method." *Id.*, at 22.

The material support statute therefore eschews reliance on terrorists' self-description and focuses instead on violence. A designated terrorist organization is one that "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to engage in terrorist activity or terrorism." 8 U.S.C. § 1189 (2009). This definition recognizes that whatever political or religious cause the terrorist organization

declares, whatever humanitarian activities the organization engages in, the organization exists to perpetrate violence. To effectively curtail FTO fundraising,[10] Congress determined that all contributions—even those purported to advance allegedly lawful functions of a terrorist organization—be prohibited:

> This section recognizes the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization's treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.

H.R. REP. 104-383, at 81.

As this Court has recognized, the fungibility of money makes financial sanctions an appropriate national security tool to weaken opponents. In *Regan v. Wald*, 468 U.S. 222, 243 (1984), this Court upheld the State Department's limitations on travel to Cuba, noting that such limitations would "curtail the flow of hard currency to Cuba – currency that could then be used in support of Cuban adventurism." *Id.* Similarly, the purpose behind provisions permitting seizure of alien property in a time of emergency is "to

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[10] Dismantling terrorist funding mechanisms is "essential," to disrupt FTO operations and limit their ability to attack. Financial Action Task Force, *Terrorist Financing* [FATFA/OECD] at 7 (Feb. 29, 2008) *available at* http://www.fatf-gafi.org/dataoecd/28/43/ 40285899.pdf.

weaken enemy countries by depriving their supporters of power to give aid." *Farbwerke Vormals Meister Lucius & Bruning v. Chemical Foundation, Inc.*, 283 U.S. 152, 161 (1931); *see also Silesian-American Corp. v. Clark*, 332 U.S. 469, 476-477 (1947).

More recently, the United Nations recognized the importance not only of freezing financial assets and economic resources but also of prohibiting the provision of funds, assets, or "financial or other related services" available to terrorists or "entities owned or controlled" by terrorists. S.C. Res. 1373 ¶ 1, U.N. Doc. S/Res/1373 (Sept. 28, 2001). States were thus instructed to "refrain from providing any form of support, active or passive," to terrorists. *Id.* It is now well accepted that criminalizing the provision of funds to terrorist organizations is a powerful tool for prevention of terrorist acts. United Nations Counter-Terrorism Implementation Task Force [CTITF], *Working Group Report: Tackling the Financing of Terrorism*, ¶ 9, (October 2009), at http://www.un.org/terrorism/pdfs/CTITF_financing_ENG_final.pdf.

Non-monetary work or services provided to these terrorists can be as good as cash, allowing the organization to defray costs of its overt activities, divert funds to the purchase of arms, and free up personnel for missions of terror. The provision of personnel and services lends credibility to the terrorist organization, which in turn assists with recruitment, radicalization, and grassroots support. As noted by the Financial Action Task Force, "propaganda and ostensibly legitimate social or charitable activities are needed to provide a veil of legitimacy." Financial

Action Task Force, *Terrorist Financing* at 7 (Feb. 29, 2008) at http://www.fatf-gafi.org/dataoecd/28/43/40285899.pdf (*"Terrorist Financing"*).

2. Charitable Donations Are A Mainstay of Terrorist Financing

The nature of the terrorist organization is unaffected by its label, but its potential donors are greatly influenced by words. Few people will knowingly provide assistance to terrorists, but countless individuals donate to charities each year--often without knowledge of where their money eventually goes. *Id.*, at 13, n. 12. The combination of a large and steady source of money and lack of financial oversight make charitable organizations fertile soil for terrorist fundraising. GAO Report at 13-14.

It is well documented that terrorist organizations use charities—pre-established or of their own creation—to raise funds. GAO Report at 13-14; *Terrorist Financing* at 8, 12; Zachary Abuza, NBR Analysis, *Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiyah*, Vol. 14, No. 5, at 7-8 (December 2003), http://www.nbr.org/publications/analysis/pdf/vol14no5.pdf. So widespread is terrorism's abuse of charitable organizations that the Financial Action Task Force found "the misuse of non-profit organisations [sic] for the financing of terrorism is coming to be recognised [sic] as a crucial weak point in the global struggle to stop such funding at its source." *Terrorist Financing*, *supra*, at 11. The trend is not new; Al Qaeda began manipulating charities in the late 1990's by installing terrorists into leadership roles of various charitable organizations. Abuza, *supra* at 22.

The move was so successful that charity has been described as Al Qaeda's financial backbone. *Id.*, at 8.

International terrorist organizations such as The Kurdistan Workers' Party, the Liberation Tigers of Tamil Eelam ("LTTE"), Hamas, and their ilk systematically conceal their violent activities behind charitable, social, and political fronts. The idea that there is a distinction between an FTO's violent and its "humanitarian" work is a myth. A former FBI counterterrorism intelligence analyst confirms that there is no division of terrorist goals as an FTOs overt, "legitimate" activities are central to recruiting, indoctrinating, training, funding, and "dispatch[ing] suicide bombers to attack civilian targets." MATTHEW LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD, 6 (Yale University Press 2006).

Inside the Palestinian territories, for example, Hamas operates mosques, schools, orphanages, and summer camps. The benevolent façade hides a sinister intent:

> Hamas uses the mosques and hospitals it maintains as meeting places, buries caches of arms and explosives under its own kindergarten playgrounds, uses social-welfare operatives' cars and homes to ferry and hide fugitives, and transfers and launders funds for terrorist activity through local charity committees.

LEVITT, *supra* at 6; *see also* 153 CONG. REC. S15876 (daily ed. Dec. 18, 2007) (statement of Sen. Kyl). The

internet can be manipulated as well. LTTE established its first internet site, TamilNet.com, in 1995. HOFFMAN, *supra* at 204. After the Sri Lanka tsunami in December 2004, LTTE's web sites contained links to information about relief efforts, encouraging would-be donors to "contact your nearest Tamils Rehabilitation Organisations [sic] office." *Id.* at 205. The Tamils Rehabilitation Organization "is the preferred means for sending funds from the United States to the LTTE in Sri Lanka," and was designated as a terrorist organization for the purpose of freezing its assets in November 2007. Press Release U.S. Dep't. of the Treas., Treasury Targets U.S. Front for Sri Lankan Terrorist Organization, TG-22 (Feb. 11, 2009). Its sister organization, the Tamil Foundation, was recently named a terrorist organization as well. *Id.* These links are no coincidence; FTO's understand the power of charity. In 1993, federal law enforcement officials undertook surveillance of a meeting in Philadelphia amongst members of the Palestine Committee. During the meeting, the leaders discussed how best to utilize the United States as a safe and lucrative place for fundraising and propaganda, stressing that the capabilities for fund-raising in America were amplified by its "democratic environment." Conference attendees recognized that effective fundraising in America required an agreeable disguise. *See* Transcript of Trial at Vol. 15, 103:13—04:2, *United States v. Holy Land Found. for Relief & Dev.*, 2007 WL 1452489 (N.D. Tex. 2008) (No. 3:04-CR-240-P). As one member of the Palestine Committee suggested:

> [L]et's stay ahead of the events, our brothers. . . . [W]e should start right now, my broth-

> ers, begin thinking about establishing alternative organizations which can benefit from a new atmosphere, ones whose Islamic hue is not very conspicuous.

Id.

These new organizations would support the families of the martyrs, but the members knew this would be unpalatable in the United States. *See* Transcript of Trial at Vol. 11, 67-68, *United States v. Holy Land Found for Relief & Dev.*, 2007 WL 1452489 (N.D. Tex. 2008) (No. 3:04-CR-240-P). Thus they determined they would mask their goal under the banner of human rights—care for all Palestinians. "Our relationship with everyone must be good but we gave the Islamists $100,000 and we give others $5,000." *Id.*, at Vol. 14, 169:21-170:1.

In response to the Philadelphia meeting, numerous Islamic charities were chartered in the United States and throughout the world, operating as front groups for Hamas. Many have since been investigated, indicted, and convicted for their roles in funneling financial and other resources to Hamas and other designated terrorist organizations. For example:

- The Holy Land Foundation for Relief and Development claimed to be supporting humanitarian efforts in the Palestinian territories, but the FBI claimed that Holy Land Foundation funds were used by Hamas to indoctrinate children into careers as suicide bombers. Memorandum from Dale Watson, Assistant Director for Counterterrorism, FBI, to R. Richard Newcomb, Director of

the office of Foreign Assets Control, "Holy Land Foundation for Relief and Development, International Economic Emergency Powers Act, Action Memorandum," U.S. Department of the Treasury 16-18, 27 (Nov. 5, 2001) *available at* http://fletcher.tufts.edu/forum/archives/pdfs/27-1pdfs/Levitt3.pdf, n. 17. "[B]y providing these annuities to families of Hamas members, the HLFRD assists Hamas by providing a constant flow of suicide volunteers and buttresses a terrorist infrastructure heavily reliant on moral support of the Palestinian populace." *Id.*

- The Global Relief Foundation publicly claimed to be a humanitarian relief organization, but produced and distributed a pamphlet in 1995 which reads: "God equated martyrdom through jihad with supplying funds for the jihad effort. All contributions should be mailed to GRF." Press Release, U.S. Dep't. of the Treas., Treasury Department Statement Regarding the Designation of the Global Relief Foundation PO-3553 (Oct. 18, 2002). GRF "has connections to, has provided support for, and has provided assistance to Usama Bin Ladin, the al Qaida Network, and other known terrorist groups." *Id.*

- The Islamic Committee for Palestine was a self described "humanitarian" group which served as a front organization for Palestinian Islamic Jihad. *Progress Since 9/11: The Effectiveness of the U.S. Anti-Terrorist Financing Efforts: Hearing before the House Comm. on Financial Services, Subcomm. on Oversight and Investigations*, Serial No. 108-10 at 30, 73 (March 11, 2003) (Statement of

> Steven Emerson, Director, The Investigative Project). At an ICP-organized Chicago conference held in 1990, one speaker enumerated the "operations" carried out by Islamic Jihad "martyrs" in Palestine and solicited funds for the families of the terrorists.

Id.

These examples underscore what is already known: terrorists cannot be expected to provide truthful discourse about their activities, nor sequester violence from public service. Groups will build schools, hospitals, and roads in order to win the public support, but any humanitarian effort exploited by terrorists is charity in name only. Rather than mitigate the violence that these groups promote, their humanitarian projects advance their destructive agendas.[11]

This type of deception by regulated individuals or groups is nothing new. This Court has refused to allow designated enemy nationals to avoid the law by subterfuge. Like terrorists hiding behind charity, enemy nationals who used shams to hide their interest in assets were "neutral in name only" and could not

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[11] AEDEPA defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d). The United States Department of Defense defines it as: "The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological." Department of Defense, Dictionary of Military and Associated Terms 550 (Aug. 19, 2009) at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf; *see also* HOFFMAN, *supra*, at 31.

escape their "enemy taint." *Uebersee Finanz-Korporation, A. G. v. McGrath*, 343 U.S. 205, 211 (1952) (petitioner neutral in name only due to predominant influence of enemy national); *Stoehr v. Wallace*, 255 U.S. 239, 251 (1921).

If the Court adopts the view of the Ninth Circuit —that it is possible to donate to "good" parts of a terror organization without benefiting the "bad"—then we will reach "the brink of a precipice of absurdity." *See AT&T Corp. v. Hulteen*, S. Ct. 1962, 1980 (2009). Viewing an organization such as Hezbollah in terms of charity without regard to its terrorist arm is "to think of something which is inextricably related to some other thing and not think of the other thing." *Id.* Congress avoided this absurd result by proscribing *all* support. To do anything less renders the ban on material support meaningless and permits terrorists to manipulate not only our charity, but our law as well.

III. SECTION 2339B DOES NOT UNCONSTITUTIONALLY INFRINGE UPON PROTECTED SPEECH

Though the First Amendment provides foundational rights, it is only one part of an entire Constitution. This Court has never adopted the view that absolutism for the First Amendment should come at the cost of the Constitution's other provisions.

In the instant case, First Amendment absolutism cannot come at the cost of preventing the political branches from fulfilling their constitutional duty to protect and defend the nation. While the statute at issue does not escape constitutional scrutiny by this

Court altogether, "it is part of the process of constitutional scrutiny to recognize when the Constitution itself requires special deference." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

Respondent argues that section 2339B could conceivably restrict the ability of U.S. citizens to express their ideas, in violation of the First Amendment. This Court has several reasons to reject this claim. First, the statute is designed to prohibit "supporting" and "aiding" terrorists. This is conduct. Unless the conduct itself is expressive, this Court has held, and should continue to hold, that a First Amendment analysis is inappropriate. Second, even if section 2339B does touch upon free speech, the statute sufficiently advances an important government interest and is narrowly tailored to pass intermediate scrutiny. *United States v. O'Brien*, 391 U.S. 367 (1968). And third, even if this Court decided to apply strict scrutiny, section 2339B is constitutional because the interest is compelling, the need is great, and the statute is narrowly limited to providing "service" or "support" to groups which have a stated goal of killing U.S. citizens.

A. The Material Support Statute Regulates Conduct, Not Speech, and Incidental Restrictions on Speech Do Not Trigger First Amendment Scrutiny.

The First Amendment acts as a shield against those who would stifle the free expression of ideas. But the shield is not an all-encompassing aegis, applicable wherever words are spoken. To the contrary, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal

merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*") 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Because individuals are still free to verbally endorse the ideas advanced by these terrorist organizations, the statute does not affect free speech, and this Court should hold that section 2339B does not implicate the First Amendment. *See id.*, at 61-62.

If a statute restricts conduct rather than directly limiting speech, it only implicates the First Amendment if it impairs actions that are "inherently expressive." *Id.*, at 66. Even if expressive, conduct may still not be protected by the First Amendment if "[t]he expressive component . . . is not created by the conduct itself but by the speech that accompanies it." *Id.* In other words, the action being restricted must have an expressive element.

It is quite clear Congress did not want to ban "speech" or "association" but rather the conduct of aiding terrorism more generally. *United States v. Taleb-Jedi,* 566 F.Supp.2d 157, 167 (2008).

Here, supporters of Hizballah, PKK, LTTE or any other FTO are free to discuss and even advocate for these groups and not run afoul of section 2339B. They could purchase ads, publish articles, give speeches, lobby Congress, and file amicus briefs that espouse the exact same political positions as those held by terrorist groups. During World War II, for example, Congress and the President could legitimately ban the U.S. operations of Germany's Nazi

Party, even if the First Amendment allowed speech through other conduits that advocated a negotiated settlement with the Axis powers. But under respondent's position, the Constitution would require the political branches, in wartime, to allow the Nazi party to raise money and organize in the United States itself.

This Court has never read the Constitution to require such an absurd result. Congress's interest is in preventing the harm to United States civilians—not the suppression of free expression. Therefore, even if "knowingly providing material support" involves words, it is not an expression that the First Amendment was designed to protect.[12]

B. If The Court Finds Speech Rights Are Implicated, The *O'Brien* Intermediate Scrutiny Standard Is Still Satisfied

Even if this Court holds that free speech was directly affected, free speech is not the target of section 2339B and as such strict scrutiny is inappropriate. Rather, if free speech is implicated at all, the correct test is that of *United States v. O'Brien*, 391 U.S. 367 (1968).

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[12] When Constitutional challenges to the Internal Security Act of 1950 (in part, whether membership in Communist Party could be a criminal violation), analysis turned on whether "the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with 'the substantive evils that Congress has a right to prevent.'" *Scales v. United States*, 367 U.S. 203, 229 (1961).

If government conduct indirectly affects free speech, "a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.*, at 376. An incidental free speech limitation is constitutional if:

> [1] it is within the constitutional power of the government; [2] if it furthers an important or substantial government interest; [3] if the government interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id., at 376-77.

In *O'Brien*, this Court considered whether the burning of a draft card was protected expression. It concluded that Congress's ability to raise and support armies is so "broad and sweeping" as to outweigh any conceivable First Amendment violation. *Id.*, at 375-76. This Court should reach a similar judgment with the material assistance statute: the political branches' ultimate duty to protect the Nation from external attack outweighs any alleged First Amendment interests.

In *FAIR*, this Court affirmed that *O'Brien* applies when conduct is "inherently expressive." *FAIR*, 547 U.S., at 66. The test makes sense. *O'Brien* accurately weighs the importance of protecting speech (even if it is only incidentally being suppressed) with the importance of the government action in each case. Here,

protecting free speech must be balanced against the discretion lodged in the Legislative and Executive branches regarding foreign affairs, where "judicial deference . . . is at its apogee." *Id.* at 58 (quoting *Rostker*, 453 U.S., at 67).

Applying *O'Brien*, the government's overriding and compelling objective of defeating terror justifies any incidental restrictions. The government interest is at a minimum "important" or "substantial," see *id.*, at 376, as "[i]t is obvious and unarguable that no government interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). Nor is the statute intended to restrain speech: Section 2339B does not prohibit the expression of ideas similar to the designated terrorist groups, but rather seeks to avoid the manifestation of those ideas in violence. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000).

Section 2339B extends no further than is essential to address national security. It "does not restrict a person's right to join an organization." H.R. REP. 104-383, at 43. Nor is an individual restricted from freely expressing an ideology or political philosophy. *Id.*, at 45. "Those inside the United States will continue to be free to advocate, think, and profess the attitudes and philosophies of . . . foreign organizations [designated FTO's]." *Id.* Courts have been careful to distinguish between "groups that ... merely advocate terror, violence, and murder of innocents" and those that "actually carry out what they advocate," so that the court can draw a "clear line between First Amendment protected activity and criminal conduct for which there is no constitutional protection."

United States v. Lindh, 212 F. Supp 2d 541, 568 (E.D.Va. 2002).

Section 2339B satisfies the *O'Brien* factors, and passes First Amendment scrutiny.

C. The Material Support Statute Survives Even Strict Scrutiny, as National Security is the Utmost Compelling Interest and The Statute is Narrowly Tailored to Protect The Nation from International Terrorism

In national security and foreign affairs, the strict scrutiny standard is ill-suited to this Court's long-standing deference to the Legislative and Executive branches. *See Rostker*, 453 U.S., at 67. Strict scrutiny is particularly inappropriate where, as here, the government does not restrict activity because of the content or viewpoint of speech. However, even if the Court applies strict scrutiny, section 2339B remains constitutional. Preventing terrorism and weakening terrorist groups is a compelling interest. Preventing aid and support to those groups serves that interest. And, despite wide-ranging hypotheticals to the contrary, section 2339B was designed to allow speech, advocacy, and other domestic expression. No intuitive reading suggests otherwise.

1. Preventing Aid to Terrorists Is A Compelling Government Interest

"[N]o governmental interest is more important than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). In the 21st century, the Executive has made clear that the most significant external threat is global terrorism:

> Terrorist networks currently pose the greatest national security threat to the United States. . . . The enemy is a federated terrorist threat complex with the character of a global insurgency. . . .

See Statement, Department of State, Office of the Coordinator for Counterterrorism, available at http://www.state.gov/s/ct/enemy/index.htm (last visited December 22, 2009).

Congress concurred with the Executive's description of the terrorist threat when it passed the Anti-Terrorism and Effective Death Penalty Act, which contains section 2339B, noting that international terrorism "threatens the vital interests of the United States." *See* Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(1) & (7), 18 U.S.C. § 2339B *note* (1996).

No decision by this Court has held that national security, when dealing with a clear and present threat, is anything other than compelling. The Court must not deviate here, where the country has been directly attacked by terrorist groups in two of its major cities and lost almost 3,000 civilian lives.

2. The "Narrowly Tailored" Prong Must Be Applied in The Context of the Unpredictable and Dangerous Realm of Foreign Affairs.

Whether or not a government action was sufficiently "tailored" must depend on the context in which the action was taken. When it comes to areas where the Executive and Legislative branches have

greater expertise or knowledge, such as creating the Army or Navy, there is significantly more deference to those branches' choices: "The issue is not whether other means of raising an army and providing for a navy might be adequate." *FAIR*, 547 U.S. at 67. "Regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

Because a judge is less capable of identifying and neutralizing terrorist threats, "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689 Indeed:

> In *Community for Creative Non-Violence*, [468 U.S. 288, 299 (1984)] we observed that *O'Brien* does not assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained. We are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation.

Id. (internal citations and quotation marks omitted).

Before determining whether section 2339B is narrowly tailored, this Court should recognize that a large amount of deference is due—and the other

branches decided that section 2339B is the best way to prevent aid to terrorists.

3. Preventing All Aid, Support, or Assistance to Terrorist Groups is an Appropriate Response to a Terrorist Threat

Perhaps in no other area has the Court accorded Congress greater deference than in cases that arise in the context of Congress's authority over national defense and military affairs. *Rostker*, 453 U.S., at 64-65. In times of war, as now, this deference is even more pronounced. Courts have deferred to wartime actions of the political branches even when such actions have directly infringed speech-related liberties of individuals. For example, in *Schenck v. United States*, this Court upheld the treason convictions of several men who had distributed subversive, anti-war literature during World War I. 249 U.S. 47, 48-49 (1919). This Court held that distributing literature which encouraged resistance to the draft presented a sufficient danger to national security that it was not entitled to First Amendment protection. *Id.*, at 51-53. This Court further stated: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*, at 52. As this Court further explained in *Near v. Minnesota*, 283 U.S. 697, 716 (1931): "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." In

United States v. Progressive, Inc., a federal district court enjoined the publication of a "how-to" guide for making a hydrogen bomb. 467 F. Supp. 990 (W.D. Wis. 1979). Citing *Near*, the district court stated that "grave national security concerns. . . are sufficient to override First Amendment interests." *Progressive*, 467 F. Supp. at 992; *see also Near*, 283 U.S., at 716.

This deference does not end with foreign affairs. Indeed, there are many cases where incidental free speech concerns give way to the needs of government. For example, when balancing speech rights and public safety, this Court established that a criminal statute enacted for the legitimate purpose of deterring criminal activity does not violate the First Amendment if individuals decide to censor themselves. *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 59-60 (1989). The petitioner in that case argued that the Racketeer Influenced and Corrupt Organizations Act ("RICO") unconstitutionally chills First Amendment freedoms because its "draconian" sanctions intended for use as "heavy artillery" for the "war on crime" will compel adult booksellers to remove First Amendment protected content from their shelves to avoid potential prosecution. *Id.*, at 59-60. The Court disagreed: "[M]ere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents." *Id.*, at 60.

Nor is section 2339B unconstitutional merely "because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Striking down Sec-

tion 2339B for some potentially more narrow definition would substitute this Court's judgment for that of the political branches about the most effective way to conduct war.

Section 2339B furthers the most compelling of government interest - preventing future attacks on the Nation. Any particular instances of speech prohibited by Section 2339B are insubstantial compared to the duty of the government to protect the national security in time of war.

CONCLUSION

The decision of the court below should be reversed.

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